

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 03-20192-01-cr-CM-DJW

DEMETRIUS HARGROVE,

Defendant.

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Request for Funds to Hire Case Investigator and Mitigation Investigator and for Approval to Exceed 21 U.S.C. 848(q)(10)(b) Funding Limits (doc. 11). The Motion also seeks authorization of interim payment for the services of the case investigator and mitigation investigator. The Government has communicated to the Court that it does not oppose Defendant's Motion.

A. Authorization to Hire Investigators

Pursuant to 21 U.S.C. § 848(q)(10), the Court may authorize fees and expenses to pay investigators or other experts in a capital case. Pursuant to 21 U.S.C. § 848(q)(9), however, the Court must make a finding that such services are reasonably necessary for representation of Defendant. Here, Defendant seeks authorization to hire a case investigator, who will be charged with the duty of discovering evidence with regard to the first phase of trial. Defendant also seeks authorization to hire a mitigation investigator, who will be responsible for discovering mitigation evidence material to any penalty phase of trial.

A state must provide an indigent defendant with the basic tools to present an adequate defense.¹ An indigent defendant requesting appointment of an investigator, however, “bears the burden of demonstrating with particularity that such services are necessary to an adequate defense.”² The Tenth Circuit considers three factors to determine what tools of defense are required: (1) the effect on the defendant’s private interest in the accuracy of the trial if the requested service is not provided; (2) the burden on the government’s interest if the service is provided; and (3) the probable value of the additional service and the risk of error in the proceeding if such assistance is not offered.³

In this case, the first and second prongs of this test are easily satisfied because as the Supreme Court has held, “[t]he private interest in the accuracy of a criminal proceeding that places an individual’s life or liberty at risk is almost uniquely compelling,” and although the State’s interest in financial economy may weigh against the provision of experts to indigent defendants, its “interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.”⁴

¹*Hawkins v. Mullin*, 291 F.3d 658, 671 (10th Cir. 2002) (citing *Rojem v. Gibson*, 245 F.3d 1130, 1139 (10th Cir. 2001) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985))).

²*Id.* (citation omitted).

³*Id.* (citing *Rojem*, 245 F.3d at 1139 (quotation omitted)).

⁴*Id.* (citing *Johnson v. Gibson*, 169 F.3d 1239, 1246 (10th Cir. 1999) (quoting *Ake*, 470 U.S. at 78-79)).

“The third factor[, therefore,] is the critical factor.”⁵ While an indigent defendant is not constitutionally entitled to “all the assistance that his wealthier counterpart might buy, . . . fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system.”⁶ In deciding whether to authorize investigative services, “most courts rely on the judgment of the defense attorney if he makes a reasonable request in circumstances in which he would independently engage such services if his client was able to pay for them.”⁷ “Although the legislative history of § 3006A supports a liberal attitude toward these indigent requests, a judge is still obligated to exercise discretion in determining whether such services are necessary.”⁸ Thus, while a trial court need not authorize an expenditure for a “fishing expedition,” the court “should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge.”⁹

Based on the representations of counsel for Defendant in the pleadings and the preliminary case budget presented *ex parte*¹⁰, the Court finds there is a reasonable basis for the requested services. Given

⁵*Id.* (citing *Rojem*, 245 F.3d at 1139; *Johnson*, 169 F.3d at 1246-47).

⁶*Id.* (citing *Ake*, 470 U.S. at 76-77) (explaining that indigent defendant must have “access to the raw materials integral to the building of an effective defense.”)

⁷*Id.* (citations omitted).

⁸*Id.* (citations omitted).

⁹*Id.* (citation omitted).

¹⁰In accordance with paragraph 6.03 A of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines), Volume VII, Guide to Judiciary Policies and Procedures, the Court finds counsel has made a proper showing of need for confidentiality in filing *ex parte* supplemental papers supporting Defendant’s request to engage the services of a case investigator

that proper investigation and presentation to the jury of the underlying facts and mitigating factors on behalf of Defendant will in large part determine whether Defendant is convicted of the charges against him and, if so, the sentence Defendant will receive, the Court has no doubt that such services are reasonably necessary to Defendant's defense. Accordingly, the Court authorizes Dennis Conway to undertake case investigation and Michael Armstrong to undertake mitigation investigation – both on behalf of Defendant in this matter. The Court authorizes compensation for both investigators at the rate of \$50.00 per hour and, at this time, pre-authorizes 70 hours by Conway and 70 hours by Armstrong. Counsel for Defendant are hereby notified that the Court will issue an order authorizing further case investigation and mitigation related expenditures of an additional 330 hours for Conway and an additional 330 hours for Armstrong upon approval of a recently submitted request for such advance authorization to the Chief Judge of the United States Court of Appeals for the Tenth Circuit.

B. Interim Payment Authorization

Because of the expected length of the proceedings in this federal capital prosecution and the anticipated hardship on persons providing services pursuant to 18 U.S.C. § 3006A(e) and 21 U.S.C. § 848(q)(9) and (q)(10)(B) for such a period without payment, and in accordance with paragraph 6.03 D of the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (CJA Guidelines), Volume VII, Guide to Judiciary Policies and Procedures, the following procedures for interim payments shall apply during the period of time in which services are provided in connection with this case.

1. Submission of Vouchers

and mitigation investigator.

Persons providing services under 18 U.S.C. § 3006A(e) and 21 U.S.C. § 848(q)(9) and (q)(10)(B) shall submit to the clerk, once each month, an interim CJA Form 31, "Authorization and Voucher for Expert and Other Services." Compensation earned and reimbursable expenses incurred from the first to the last day of each month shall be claimed on an interim voucher submitted no later than the tenth day of each month, or the first business day thereafter. The first interim voucher submitted shall reflect all compensation claimed and reimbursable expenses incurred from the date on which your services first were retained to April 30, 2004, and shall be submitted no later than May 10, 2004; thereafter, the vouchers shall be submitted once each month according to the schedule outlined above. Claimants shall complete Item 17 of each interim voucher submitted. Each interim voucher shall be assigned a number when processed for payment. Interim vouchers shall be submitted in accordance with this schedule even though little or no compensation or expenses are claimed for the respective period. All interim vouchers shall be supported by detailed and itemized time and expense statements. Chapter VI and the applicable provisions of Chapter III of the CJA Guidelines outline the procedures and rules for claims by persons providing services pursuant to 18 U.S.C. § 3006A(e) and 21 U.S.C. § 848(q)(9) and (q)(10)(B), and should be followed regarding each voucher. The undersigned Magistrate Judge will review the interim vouchers when submitted, particularly with regard to the amount of time claimed, and will authorize compensation to be paid for two-thirds of the approved number of hours. This compensation will be determined by multiplying two-thirds of the approved number of hours by the applicable rate. The undersigned Magistrate Judge also will authorize for payment all reimbursable expenses reasonably incurred.

At the conclusion of the period during which the claimant provides services in this case, he or she

shall submit a final voucher seeking payment of the one-third balance withheld from the earlier interim vouchers, as well as payment for services rendered during the final interim period. The final voucher shall set forth in detail the time and expenses claimed for the entire case, including all appropriate documentation. A statement should be attached to the voucher which reflects all compensation and reimbursement previously received, as well as the net amount remaining to be paid at the conclusion of the case. After reviewing the final voucher, the court will submit it to the chief judge of the circuit, or his or her delegate, for review and approval.

2. Reimbursable Expenses

Persons providing services pursuant to 18 U.S.C. § 3006A(e) and 21 U.S.C. § 848(q)(9) and (q)(10)(B), may be reimbursed for out-of-pocket expenses reasonably incurred incident to the rendering of services. The following guidelines may be helpful:

Case-related travel by privately owned automobile should be claimed at the rate of 37.5 cents per mile, plus parking fees, ferry fares, and bridge, road and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis. Air travel in “first class” is prohibited. For service providers requiring air travel, counsel are encouraged to contact the clerk for authorization to travel at government rates.

Actual expenses incurred for meals and lodging while traveling outside of the Kansas City Metropolitan area in the course of this representation must conform to the prevailing limitations placed upon travel and subsistence expenses for federal judiciary employees in accordance with existing government travel regulations. For specific details concerning high cost areas, counsel should consult the clerk.

Telephone toll calls, telegrams, photocopying, and photographs can all be reimbursable expenses

if reasonably incurred. However, general office overhead, such as rent, secretarial help, and telephone service, is not a reimbursable expense, nor are items of a personal nature. In addition, expenses for service of subpoenas on fact witnesses are not reimbursable, but rather are governed by Fed. R. Crim. P.17 and 28 U.S.C. § 1825.3.

Answers to questions concerning services provided pursuant to 18 U.S.C. § 3006A and 21 U.S.C. § 848(q), as amended, can generally be found in (1) these statutes; and (3) the CJA Guidelines, published by the Administrative Office of the United States, also available through the clerk. Should these references fail to provide the desired clarification or direction, counsel should address their inquiry directly to the undersigned Magistrate Judge or his law clerk, Melissa Taylor.

In light of the discussion above, it is hereby ordered that Defendant's Motion is

- (1) granted to the extent that the Court hereby authorizes Dennis Conway to undertake case investigation and Michael Armstrong to undertake mitigation investigation – both on behalf of Defendant in this matter;
- (2) granted to the extent that the Court hereby authorizes compensation for both investigators at the rate of \$50.00 per hour and pre-authorizes 70 hours by Conway and 70 hours by Armstrong;
- (3) granted to the extent that interim payments to Mr. Conway and Mr. Armstrong are approved and that said service providers shall submit interim vouchers on a monthly basis as specifically set forth above; and
- (4) deferred to the extent that an order will be issued regarding Defendant's request to exceed 21 U.S.C. § 848(q)(10)(B) funding limitations at a time after the Court receives a response

to its recently submitted request for advance authorization to the Chief Judge of the United States Court of Appeals for the Tenth Circuit.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 3rd day of May, 2004..

s/ Carlos Murguia
Carlos Murguia
United States District Judge

cc: All counsel and *pro se* parties